

DOCUMENT RESUME

ED 196 007

CS 205 986

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TITLE The Private Lives of Public Officials: Can the Right of Privacy Survive the First Amendment?
PUB DATE 77
NOTE 42p.
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Civil Liberties: *Freedom of Speech: Journalism: *News Reporting: *Privacy: *Public Officials

ABSTRACT

The right of privacy versus the public's right to know as protected by the First Amendment is discussed in this paper. A formula is suggested based on Alexander Meiklejohn's interpretation that information about any individual, either a public official or a private person, would be protected as part of the public domain of knowledge if it is required by the public to fulfill its self-governing responsibility. Also supported is the concept that regardless of an individual's status in society, the communication of private information not relevant to the public's self-governing needs could be restricted through established procedures of due process. The paper argues that the determining factor is the nature of the information in question and its relevance to self-government and not the nature, or status, of the individual who seeks to keep the information private. It is stated that the right of privacy is the best guarantee of refuge against the impersonal and dehumanizing forces of contemporary society. (MKM)

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THE PRIVATE LIVES OF PUBLIC OFFICIALS:
CAN THE RIGHT OF PRIVACY SURVIVE
THE FIRST AMENDMENT?

by

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1977

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The present decade has been a time of burgeoning communication, in which technological advances in the collecting, processing and transmitting of information by public and private agencies seems to portend the advent of McLuhan's global village.¹ While there is skepticism that McLuhan's predictions about communications will be realized,² the increasing pervasiveness of cable communication, micro-relay and satellite communication systems, and the expanding use of computerized information retrieval systems by government, business, educational institutions and the news media demonstrates that the United States is becoming a "wired nation".³

Learned speculations and commentaries on the future role of communication in society read like a Jekyll and Hyde tale containing the promise of beneficence and the threat of malevolence.⁴ Among the benefits promised are a better informed electorate and leadership, faster, more authoritative decision-making and a better educated public. Weighted against these promises is the danger that science and technology will advance to the point where they are, as one scholar put it, "clearly able to invade a great many civil liberties faster than the individual is able to defend

them."⁵ The individual right that is the most vulnerable to the onslaught by information and communication is privacy, which Justice Brandeis called "the most comprehensive of rights and the right most valued by civilized men."⁶ As ever more powerful engines of publicity are developed, whether for use by public or private agencies, the clash between two precious values--the public's need to know and an individual's right to privacy--becomes more intense.⁷ How can these values be reconciled?

Privacy, defined as an individual right, is clearly at a disadvantage. American courts ruling on suits for invasion of privacy usually have resolved the conflict by balancing society's interest in the free flow of information against the individual's desire "to be let alone." This may be a mis-weighing of values in which the outcome is predetermined.⁸ Some have argued that an individual's right of privacy is a concept that has broad social and psychological implications.⁹ Its further erosion can only compound the negative characteristics of a society growing increasingly impersonal and complex.

Can the right of privacy survive? By its nature it is both a constitutional and tortious legal concept. Its prospects are mixed. The Supreme Court has found protection for it against invasion by agents and agencies of the government in the "penumbras" of the Bill of Rights, especially in the Fourth Amendment.¹⁰ Against its invasion by non-governmental

agencies, including the news media, there is far less protection.¹¹

The data banks of credit card companies, privately-owned business and non-governmental research organizations are a threat, but one for which there is a resolution, i.e., through government regulation in the public interest based upon precedent in regulation of other areas of business activity. It is the news media, with their constitutionally mandated responsibility to inform, educate and entertain the public using the shield of the First Amendment, that poses a seemingly unrestrainable threat to the right of privacy. Of course the freedoms of speech and press and the concomitant "public's right to know" are values integral to democracy, and they should not be abrogated. The press, in its rush to fulfill its mandate, has often trampled upon privacy, itself a core value.

The central role of the media in the clash between the public's right to know and an individual's right to privacy is demonstrably highlighted by the press's coverage of public officials. Therein lies the eye of the storm over the future of privacy. After all, public officials are citizens entitled to the same rights and privileges as other Americans. However, because of their status as servants of the public and their responsibilities to the public in a democratic society, isn't the public entitled to know as much about them as it can find out in order that informed decisions can be made about who its leaders will be?

Throughout American history the press has never limited itself only to reporting on the official actions and public statements of government officials, but has found it necessary to comment and report on the character and personal life of officials.¹² This permitted the public to know and evaluate the persons behind the mask of public office. Because of their position in the community, state or nation, public officials were to be subjected to a close scrutiny by the press. At times this scrutiny became too close, and it was felt that the press had irresponsibly intruded into the "domestic circle." The curiosity of the sensationalistic popular press of the late 19th century about the private lives and affairs of public officials and the social elite raised gossip to a marketable commodity.¹³ It was to this annoying intrusion that Samuel D. Warren and Louis D. Brandeis addressed themselves in their famous Harvard Law Review article of 1890 in which they defined a right of privacy.¹⁴ What would prove to become the most influential law review article ever published had little affect at first, but beginning with a statute passed by the New York State Assembly in 1903 that provided redress for invasion of privacy through the courts,¹⁵ and a decision by a Georgia state court in 1905¹⁶ the right has gained recognition in most jurisdictions in the country.¹⁷

Although widely recognized, the right today seems egg-shell thin, especially with respect to the privacy of public

officials. The conjunction of the terms "privacy" and "public official" seems contradictory. How can those who are elected or appointed government officials expect to have any privacy when the public's demand for information about them is so great? If Warren and Brandeis were shocked and annoyed by the press of the late 19th century, they would certainly be stunned by the apparently voracious appetite of today's news media for every minutiae of information about the private lives of those in the public eye. They deplored "idle gossip" and the satisfaction by the daily press of the public's prurient interest in the sexual activities of the famous.¹⁸ But Warren's and Brandeis' Victorian sexual mores and codes of propriety have long been passé and public conduct and conversation that was unconscionable then, is commonplace now.

It has been said that the curiosity of the American people was a fact of nature predating the printing press's appearance in the New World.¹⁹ Gossip whispered over the back fence was an early way of exchanging news and information. But as the society grew more complex and impersonal the eagerness to communicate with, and learn about, others bestowed upon the media a power over the lives of their audience. The media, at first only newspapers, magazines and books, to be joined by radio, television and film in the 20th century, came to possess control over most of the significant means of private and governmental access to the people except

for the mails and the telephone.²⁰ The whispered, back-fence gossip had been supplanted by the more authoritative voice, sight and printed word of the modern mass media.

The old curiosity about the closeted behavior of neighbors, while it still continues, has been broadened to include the private lives of prominent public officials and public figures.²¹ Gossip has become the watchword of the media in the 1970's. Newsweek magazine has called Washington "Hollywood East", a designation applicable as well to other seats of power in the nation.²²

One wonders how Warren and Brandeis would have reacted to the reporting by today's media of the peccadilloes of public persons.²³ When they wrote that the right of privacy "would not prohibit the publication of any matter which is of public or general interest" they could not have foreseen that their exemption would be interpreted to include a congressman's affair with his secretary, or of another with a stripper, the details of a First Lady's and a Vice President's wife's mastectomies, the alleged extra-marital affairs and drinking habits of former presidents, and the marital problems of several governors.²⁴

How did this "gossipmania" start? The 1960's was a time of heightened social and political concern. The public's attention was focused upon civil rights, opposition to the Vietnam war and the new life-style of the counter-culture. The Watergate scandals of the Nixon administration were a kind of catalyst in the transition from the seriousness

of the 1960's to the triviality of the 1970's. The war wound down and opposition to it dissipated; Madison Avenue co-opted the counter-culture life-style, and except for busing, civil rights lost the attention of the majority.

As these concerns generated less news, Watergate and the constitutional crisis it engendered began to dominate the evening newscasts and the pages of the daily and periodical press. In addition to the coverage of the political and legal aspects of Watergate, the news media offered the public an unprecedented "behind-the-scenes" look at its leaders. The Watergate tapes stripped away the mask of the public official's public image. Rumor, gossip and innuendo about these high-level shenanigans and their causes were justified because they were linked to factual evidence of serious wrongdoings. The public's appetite for gossip about its leaders was whetted and President Nixon's resignation and subsequent pardon, did not satisfy it. Attention was shifted to other incidents of official wrongdoing, and soon the floodgate was opened. After a time, wrongdoing was no longer needed as a justification for prying into private affairs, and investigative reporters and gossip columnists encroached on one another's territory.

While news values were altered to encompass the public's increased appetite for gossip, legal protection against libel and privacy litigation became a sine qua non. The Supreme Court had begun to provide the protection with its ruling in the libel suit, New York Times v. Sullivan in

1964.²⁵ In subsequent libel suits, the Court extended its actual malice rule²⁶ to protect the media not only against suits by public officials,²⁷ but also against suits brought by public figures. Eventually, the protection was extended to any issue of public interest.²⁸ It was the Court's ruling in Time, Inc. v. Hill that brought "false light" invasions of privacy under the Times malice rule's broad umbrella of immunity for the media.²⁹

Justice Thurgood Marshall, dissenting in Rosenbloom v. Metromedia, commented upon the nearly insurmountable barrier of media immunity against suits for libel and invasion of privacy and pondered what would become of the residual rights of reputation and privacy.³⁰

Warren's and Brandeis' tort of privacy had been construed by William Prosser as divisible into four separate, but not mutually exclusive, categories:³¹ (1) intrusion upon a plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing facts about a plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.³² The degree of protection for media activity with respect to each of the four categories of privacy varies, but, generally speaking, the protection is substantial. For example, unless a journalist actively participates in a "physical" trespass or intrusion, he will be protected.³³ "False light" invasion of privacy is still governed by the

Court's application of the Times malice rule and its broad construction of a public figure in the Hill case, although it is difficult to predict what effect the Court's recent modification of public figure status for libel suits will have on privacy.³⁴ Appropriation, which most often involves the advertising and promotion functions of the media, has found little protection due to judicial acceptance of the New York privacy statute³⁵ and the Supreme Court's attitude toward "commercial speech."³⁶ But, this too many change, perhaps to the media's advantage, because of the Court's apparently shifting attitude in favor of commercial speech.³⁷

It is against "public disclosure" suits that the media enjoy their broadest protection, and it is in this category that the tension between the public's right to know and an individual's right to privacy is the most difficult to reconcile. The gravamen of the conflict lies in the potential that a successful suit will suppress truth, a prospect that is repugnant to libertarian principles, even though the "truth" may consist only of embarrassing, intimate details of private affairs and habits. In attempts to adjudicate the conflict, American courts almost invariably have tried to balance that which can't be balanced, i.e., society's stake in the free flow of information, especially truthful information, and a lone individual's desire to have his private affairs remain private. The balance becomes even more unattainable when the individual is a public official.

The result has been that the courts, in broadly construing Warren's and Brandeis' "public interest" exemption to privacy, have ruled "newsworthy", and therefore, immune from redress, any disclosures of information that may be of interest to the public, or to part of it, instead of limiting the newsworthy defense only to disclosures of private information in the interest of the public.³⁸ It seems possible that the exemption will overwhelm and vanquish the tort, leaving it a legal shambles and of little use to anyone.³⁹

If the aforementioned comes to pass, and perhaps it already has, then it is society, not only its faceless individuals, that will suffer. If this particular dimension of the right of privacy is to survive it will have to be fashioned to provide legal redress for invasion at its most sensitive, and weakest, point--the privacy of a public official.

That the society reaps the benefits of the "breathing space" privacy offers to individuals few will deny.⁴⁰ The right proffers an individual the chance to withdraw from the collective and remove his public "face". It draws a line separating the individual and the collective, and seeks to assure an individual "a zone in which to be an individual, not a member of the community."⁴¹ There he can think his own thoughts, have his own secrets and reveal only what he wants to the outside world. After all, society exists to promote the worth and dignity of the individual, yet its courts and its news media seem bent on destroying the right specifically designed for that purpose.

The difficulty that an individual, let alone one who is a public official, has in defeating the media's defense of "newsworthiness" lies in its ambiguity as a guideline in determining what is or is not in the public interest. Furthermore, the phrase "in the public interest" is itself ambiguous. What do we mean by "public interest"? If we take it to mean any titillating tidbit of information that piques the curiosity of some or all of the media's audience, then there is no right of privacy, or at best, only a chimera of a right. Indeed the titillating and the curious may be interesting to the public, but what purposes are served by news reports of this nature? Surely, they may be entertaining, but only in a twisted sense. To say that something is newsworthy simply because an editor has decided that it is worth publicizing is to abdicate judicial responsibility for the law to the media. The press then becomes a law unto itself, at least as far as the right of privacy is concerned.⁴² In a number of cases, American courts have accepted the media's definition of newsworthiness.⁴³

But if we define "public interest" as meaning that which informs the public about its government, its culture, or the state of its society, or assists it in the democratic decision making process, then the individual, whether or not a public official, may have a chance to exercise a right of privacy.

The meaning of "newsworthy" is too susceptible to trendy

shifts in news values and too dependent upon the presumed tastes and needs of the public for information to act as a reliable and consistent guideline in determining the public interest in news. If newsworthiness is eliminated, what will replace it as a determinant of whether or not privacy has been invaded? Some have suggested a "standard of decency"⁴⁴ as a way of determining what is or is not protected communication that invades a plaintiff's privacy. But it sounds more like an ethical standard than a legal standard and is susceptible to shifts in societal mores and codes of behavior. To realize that it too is as ambiguous as newsworthiness one need only consider the problems of the judiciary in attempting to identify reliable "community standards" of decency in obscenity and pornography cases.⁴⁵ Furthermore, although journalism has codes of ethics, they are practically unenforceable. Because journalists are not licensed or certified as are doctors, nurses, lawyers and accountants, the profession has no authority to sanction violators of its codes.⁴⁶

What is needed is a standard, or "neutral principle"⁴⁷ that, while not eternal and immutable, would provide the courts and the media with a clearer, more consistent guideline for determining what is private information, and should remain so, and what is of enough public interest to permit invasion of privacy even though publicizing the information may embarrass the individual.

Because of the vicissitudes of the newsworthy defense,

journalists, as well as judges, have been left to deal with invasion of privacy questions on a case by case basis.⁴⁸ The rights guaranteed by the First Amendment need not require the total abrogation of the right of privacy,⁴⁹ both can coexist with a minimum of intrusion upon the other.⁵⁰ But this can be accomplished only if the interests protected by both are held constant.⁵¹ The threshold of First Amendment rights and values would have, of necessity, a wider latitude than that of privacy because of the central role that the free exchange of ideas plays in a democratic society. The threshold of the right of privacy, although narrower, would be inviolate in the absence of exceptional circumstances.

By holding constant the interests of both rights the fact that an individual is or is not a public official is irrelevant. What becomes the determining factor is the normative value of the information sought to be kept private. Any communication that touches an individual's "inner core of intimacy"⁵² violates the right of privacy. This core protects from invasion by the news media the interests of privacy guaranteed by the Fourth Amendment from invasion by the state.⁵³ More importantly, not only is the physical "house" protected, but also those aspects of "home life" commonly held to have intimate aspects: sexual, marital and familial relations; private conversation; eating, drinking and reading habits; health and bodily functions. Additionally, the protection would extend to a "zone of privacy"⁵⁴ or

a "sphere of space"⁵⁵ that an individual could carry with him out of the home and which would embody all the aspects of home-life. Intrusion into the zone, in any case, is permissible only upon the initiation, and with the consent, of the individual.

Because the Supreme Court has held that the public perceives its officials as having "substantial responsibility for or control over the conduct" of public affairs,⁵⁶ an additional factor must be considered in determining the extent of a public official's privacy. While protecting the integrity of the privacy values to be held constant for all individuals, it is necessary to weigh the relevance of the information sought to be kept private to the public official's execution of his public duty and his fitness for office. This factor of relevance will not vitiate the nature of the privacy interests held constant as long as the interests of the First Amendment that bear upon privacy are likewise held constant. The key to this proposal for the survival of a right of privacy is the manner in which the First Amendment interests to be held constant are defined.

Two theoretical systems lend themselves to the formulation of a definition of First Amendment interests vis a vis the interests of privacy. In Thomas I. Emerson's "speech/action" dichotomy, printed, oral, visual and symbolic expression is absolutely protected by the First Amendment from restriction as long as it does not hamper or intrude upon the exercise of other rights and privileges.⁵⁷ For example, the advocacy

of a change in the system of government, or its overthrow, that is a facet of ideological belief, or philosophical stance, is protected "speech". But when the advocacy includes indoctrination in tactics of guerrilla warfare or sabotage then it becomes "action" and is subject to restriction.⁵⁸ In applying the dichotomy to the right of privacy, the communication of information that lies outside of an individual's "zone" of privacy would be protected. Barring the consent of the individual, the communication of information about his life that falls within the zone, thus causing embarrassment of mental distress or anxiety, would not be protected and, therefore, is subject to legal redress.⁵⁹ But certain inconsistencies become apparent when applying the dichotomy to the privacy of a public official.

The nature of the political process is such that a public official finds it necessary to reveal more of his "self" to the public, in order to win its trust and confidence, than would be expected of a private person. His elevated status and responsibilities make his actions and personality susceptible to a closer scrutiny by the public than the actions and personality of an ordinary citizen and he is expected to be insured against embarrassment and criticism. Therefore, the communication of embarrassing or distressing information about a public official, while it would constitute "action" in the case of a private person, could be construed as "speech" and thus protected. While Emerson's system is instructive in identifying the demarcation between First

Amendment and privacy interests, it is unworkable in terms of the attempt to hold privacy interests constant because it requires a two-level threshold of privacy, i.e., a higher one for private citizens and a lower one for public officials.

The system that best lends itself to the protection of privacy is one adapted from Alexander Meiklejohn's interpretation of the First Amendment.⁶⁰ Meiklejohn has written that under the First Amendment "the point of ultimate interest is not the words of the speakers, but the minds of the hearers."⁶¹ By this Meiklejohn meant that the public's right to receive information that is relevant to its self-governing responsibility is absolutely protected by the First Amendment.⁶² Communicators share in this absolute protection when they provide the public with self-governing information. But when information is not of a self-governing nature, i.e., it is "irrelevant to maintaining the informed consent which sustains a democracy,"⁶³ reasonable due process limitations may be applied under the Fifth Amendment.

Translated into terms applicable to privacy, this formulation would mean that information about any individual, either a public official or a private person, would be protected as part of the public domain of knowledge if it is required by the public to fulfill its self-governing responsibility. Furthermore, regardless of an individual's status in society, the communication of private information not relevant to the public's self-governing needs could be restricted through

established procedures of due process. In this way the integrity of the balance between the right of privacy and the rights guaranteed by the First Amendment is preserved because the interests of both conflicting values are held constant. The determining factor is the nature of the information in question and its relevance to self-government, and not the nature, or status, or the individual who seeks to keep the information private.

Furthermore, "public interest" interpreted as curiosity, is distinguished from "public interest" interpreted as a normative value, i.e., the value to the public of receiving information of governing importance. There remains a constitutionally protected right to satisfy public curiosity and "publish lurid gossip about private lives," but it is a qualified Fifth Amendment right, not an absolute or unqualified First Amendment right. The latter applies only to aspects of private lives that are relevant to the democratic self-governing process.⁶⁴

Therefore, the demarcation between private and public information becomes more readily discernible, and the construction and reconstruction of the balance between the right of privacy and the First Amendment on a case-by-case basis is no longer necessary. The key which distinguishes the proposed formulation from the troublesome "newsworthiness" standard is the value of the information to the public, rather than the befuddling factor of the individual's status.

In a recent case the Florida Supreme Court upheld an order barring a reporter from attending divorce proceedings involving an elected state official and his wife.⁶⁵ The court held that even though a person is well known, this does not necessarily deprive him of his right to privacy, nor is a divorce proceeding always a "public controversy... even though the marital difficulties may be of interest to some members of the public."⁶⁶ Furthermore, the court rejected the reporter's contention that the proceeding was automatically newsworthy because it was not shown how the official's marital problems affected his public duties.⁶⁷ The implications of this decision seem to parallel the formulation of the balance suggested above. Divorce, or any marital problem, is a private matter between husband and wife. Public interest may not impinge on their privacy unless the problem interferes with one, or both, of the spouses' public responsibilities. Only when it begins to interfere with, or to impede, the official's execution of his public duties does it lose its private nature and become "self-governing" information. The effects of the problem on the individual's public life, not his private life, are important to the public who determines his fitness for office.

Similarly, how much liquor an official drinks is none of the public's business unless it renders him incapable of performing his duties in a rational manner. Neither is it important to the public to know whom a public official

sleeps with unless the information is being used to compromise, or blackmail, the official's public position. The use of private funds to purchase goods and services, unless they are illegal, is a private matter. Conversely, the use of public funds to purchase goods and services for an official's private use is a public matter. Furthermore, a public official's choice of friends, barring conflict of interest considerations, is a private concern. Physical or mental illness, unless it is terminal or debilitating, would also be shielded by the right of privacy.

The fourth estate is proud of its role as the "watch dog" of the public's rights, yet, ironically, it is among the worst violators of the right that is vital to the quality of life in society. The right of privacy is the best guarantee of refuge against the impersonal and dehumanizing forces of contemporary society, but its vitality seems to be waning largely due to the press's denigration of it in order to satisfy the public's appetite for gossip. The free flow of information and ideas will always remain vital to democratic self-government, yet what will the public gain if, in extending First Amendment protection to all information, it loses the precious rights of privacy, reputation and fair trial? What will happen to the "self" in society if there is nowhere to nurture and develop it? The private zone is shrinking, but it is not lost. If it is to be saved, it must be protected at its weakest point. Those from whom the public demands

and expects the most knowledge about the "self" must be permitted to find refuge in the right of privacy. If protection can be accorded to them, then the right will have weathered its worst storm. Those upon whom the demands for knowledge of the "self" are less will benefit the most and the quality of life in society will be assured.

NOTES

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8 Roscoe Pound, "A Survey of Social Interests," 56 Harvard Law Review 2 (1943); Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books-Random House, 1970), p. 550.

9 See Alan Westin, Privacy and Freedom (New York: Atheneum, 1967); Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 New York University Law Review 962 (1964); Sidney M. Jourard, "Some Psychological Aspects of Privacy," 31 Law and Contemporary Problems 326 (1966); Glenn Negley, "Philosophical Views on the Value of Privacy," 31 Law and Contemporary Problems 319 (1966); Roscoe Pound, "Interests of Personality"(pts. 1-2), 28 Harvard Law Review 343, 445 (1915); Edward Shils, "Privacy: Its Constitution and Vicissitudes," 31 Law and Contemporary Problems 281 (1966).

10 Griswold v. Connecticut, 381 U.S. 479 (1965).

11 See the Privacy Act of 1974, 5 U.S.C. § 552a.

12 See James E. Pollard, The Presidents and the Press (New York: The Macmillan Company, 1947); Robert O. Blanchard, Congress and the News media (New York: Hastings House Publishers, Inc., 1974); Tom Bethel, "The Myth of an Adversary Press," Harper's, January 1977, pp. 33-40.

13 E.L. Godkin, "The Rights of the Citizen, IV: To His Own Reputation," Scribner's Magazine, July, 1890, p. 67.

14 Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harvard Law Review 193 (1890).

15 New York Session Laws 1903, Ch. 132, Sections 1-2, now known as Sections 50-51, New York Civil Rights Law.

16 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 N.E. 68 (1905).

NOTES (cont'd)

17 Privacy statutes have been passed in New York, Oklahoma, Utah, Virginia, California and Wisconsin. Courts in Rhode Island, Nebraska and Texas have ruled that there is no right of privacy. Courts in Colorado, Minnesota, Massachusetts and Washington have heard invasion of privacy suits, but have decided those cases on other grounds. The remaining states recognize a common law of privacy. The right is recognized in the District of Columbia and by the federal courts.

18 Warren and Brandeis, op. cit., p. 196.

19 Don R. Pember, Privacy and the Press: The Law, the Mass Media, and the First Amendment (Seattle: University of Washington Press, 1972), p. 17.

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25 376 U.S. 254 (1964).

26 Ibid., 279-280.

27 Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

28 Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

29 Time, Inc. v. Hill, loc. cit.

30 Rosenbloom v. Metromedia, op. cit., at 79-81.

31 William L. Prosser, "Privacy," 48 California Law Review 383 (1960).

32 Ibid., p. 389.

33 See Pearson v. Dodd, 410 F.2d 701 (D.C.Cir. 1969); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

34 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974).

35 New York Session Laws 1903, loc. cit.

- 36 Valentine v. Chrestensen, 316 U.S. 52 (1942).
- 37 Bigelow v. Virginia, 421 U.S. 809 (1975).
- 38 See Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940); Time, Inc. v. Hill, op. cit., at 384 n. 8, 388.
- 39 See Edward J. Bloustein, "Privacy Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" 46 Texas Law Review 611 (1968); Comment, "The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness," 30 University of Chicago Law Review 722 (1963); Isidore Silver, "Privacy and the First Amendment," 34 Fordham Law Review 553 (1965-66).
- 40 Francis X. Beytagh, "Privacy and a Free Press: Contemporary Conflict in Values," 20 New York Law Forum 453, 481 (1975); also see references in note 9.
- 41 Emerson, op. cit., p. 545.
- 42 Shapo, loc. cit.
- 43 Sweenek v. Pathe News Co., 16 F.Supp. 746, 747 (D.C.N.Y. 1936); Associated Press v. International News Service, 245 F. 244, 248 (2d Cir. 1917), affirmed, 248 U.S. 215 (1918); Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958); Sidis v. F-R Publishing Corp., loc. cit.
- 44 Leon R. Yankwich, "The Right of Privacy: Its Development, Scope and Limitations," 27 Notre Dame Lawyer 499, 528 (1952); Alan U. Schwartz, "Danger: Pendulum Swinging," Atlantic, February, 1977, p. 33; Shapo, op. cit., p. 664.

45 See Miller v. California, 413 U.S. 15 (1973); Mel Friedman, "Judicial Thicket: The Supreme Court and 'Obscenity'," The Nation, August 6, 1977, pp. 110-13.

46 See John L. Hulteng, The Messenger's Motives: Ethical Problems of the News Media (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1976); John C. Merrill and Ralph D. Barney, eds., Ethics and the Press: Readings in Mass Media Morality, (New York: Hastings House, Publishers, 1975); Michael T. Malloy, "Journalistic Ethics: Not Black, Not White, But... A Rainbow of Gray," The National Observer, July 26, 1975, p. 1.

47 Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harvard Law Review 1 (1959).

48 Waters, op. cit., p. 84.

49 Deaton v. Delta Democrat Publishing Co., 326 So.2d 471, 474 (Miss. 1976); Briscoe v. Reader's Digest Association, 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866, 874 (Cal. 1971).

50 Briscoe v. Reader's Digest Association, loc. cit.

51 Emerson, op. cit., p. 556.

52 Emerson, op. cit., p. 557.

53 See Mapp v. Ohio, 367 U.S. 643 (1961); Justice Brandeis' dissent in Olmstead v. United States, loc. cit.

54 Emerson, op. cit., p. 545.

55 Milton R. Konvitz, "Privacy and the Law: A Philosophical Prelude," 31 Law and Contemporary Problems 271, 273 (1966).

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58 Emerson, op. cit., pp. 97-160.

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